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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 119

LOUISE M. WISSNER AND LEANDOUS H. WISSNER,
Appellants,

vs.

MARGARET WISSNER,
Appellee

AMICUS CURIAE BRIEF OF ATTORNEYS GENERAL OF CALIFORNIA, IDAHO AND NEVADA IN SUPPORT OF PETITION FOR REHEARING.

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Come now the Attorneys General of the States of California, Nevada and Idaho, and pursuant to leave of the Court, file this brief as Amicus Curiae, strongly yet respectfully urging this Court to reconsider its opinion rendered in the case of *Wissner* v. *Wissner*, dated February 6, 1950, No. 119, October Term, 1949, and to grant the Petition for Rehearing heretofore filed in said Court on behalf of the Appellee, Margaret Wissner. In so doing said Attorneys General are acting in behalf of the people of their respective states, to whose interest and social welfare the present cause is of vital concern.

Basis of Request for Rehearing

The issues in the case were framed by the following language contained in the opening paragraph of the opinion of majority of the court:

> "We are to determine whether the California community property law, as applied in this case, conflicts with certain provisions of the National Service Life Insurance Act of 1940; and if so, whether the federal law is consistent with the Fifth Amendment to the Constitution of the United States."

After framing the issues in this fashion, the Court held that a properly designated beneficiary of a National Service Life Insurance policy who is not the spouse of the insured is nevertheless entitled to all of the proceeds of the policy upon the death of the insured against any claim thereto of the surviving spouse, despite the fact that the marriage was in existence at the time the policy was acquired, that both spouses were domiciled in the community property state of California at all times, and that the premiums on said policy were paid from the army pay of the insured.

The majority of the Court based their conclusion upon the ground that it resulted from a proper interpretation of the provisions of the National Service Life Insurance Act[1] which permitted the insured to designate or change the beneficiary or beneficiaries of the insurance,[2] which exempted payments made to the named beneficiary from the claims of creditors and rendered them immune from attachment, levy or seizure,[3] and which stated that no person shall have a vested right to the proceeds.[4] After reaching this con-

[1] 54 Stat. 1008, as amended, 38 U.S.C.A. para. 801ff.

[2] 38 U.S.C.A. para. 802(g).

[3] 38 U.S.C.A. para. 816.

[4] 38 U.S.C.A. 802(i).

clusion, the majority of the Court also concluded that such an interpretation did not render the act unconstitutional since its object fell within the congressional powers over national defense.

We have given as careful consideration as possible to the opinions of the Court, both the majority and minority, and the premises upon which they are based, in the short period of time allotted to us for the filing of this brief. In support of the petition for rehearing we hereby submit the following contentions:

(1) There is neither necessity nor reason to hold or imply that the California community property law as applied in this case conflicts with certain provisions of the National Service Life Insurance Act of 1940, when the underlying basis of the California community property system is given proper consideration;

(2) We feel that this Court has not appreciated the full import of its decision in this case as it affects hundreds of thousands of soldier-citizens domiciled in community property states and millions of dollars invested by these soldier-citizens in National Service Life Insurance policies;

(3) We feel that the Court's decision creates doubt and uncertainty concerning the status of millions of dollars of assets in community property states, not only because of the implied holding that the community property law of California is in conflict with the National Service Life Insurance Act, but also because of the footnote appearing in the majority's opinion which by implication may be construed to mean that army pay achieved by a married person domiciled in a community property state may not be community property.

We feel certain that the Court will overlook the inadequacy of our presentation of the points which we shall make in support of our contentions because of the handicap

of limited time under which we labor, time which has been shortened even more by the period required to be set aside to insure the timely filing of this brief. We also have confidence that this Court in a spirit of fairness to the many soldier-citizens domiciled in community property states will carefully consider these contentions in the light of the supporting points and will conclude that a more favorable opportunity should be given to these states to support their position.

Community Property Law Is Not Inconsistent With the National Service Life Insurance Act

There can be no question but that under the community property law as it exists in California ownership of community property is vested equally in both the husband and wife, although the control and management of said property, subject to certain exceptions are lodged in the husband.[5] (*Fernandez* v. *Wiener* (1945), 326 U. S. 340, 16 S. Ct. 178, 182-183; *Poe* v. *Seaborn* (1930), 282 U. S. 101, 51 S. Ct. 58). The Supreme Court of the United States has recognized this, the minority opinion in the instant case recognized this, and the majority opinion found no occasion to refute it. There can also be no question in view of the Supreme Court's holding in *Lynch* v. *United States* (1933), 292 U. S. 571, 54 S. Ct. 840, that a National Service Life Insurance policy is not a gratuity, but is a contract and as

[5] California Civil Code, Section 161(a).

"The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in the community property."

Section 172. "The husband has the management and control of the community personal property . . ."

Section 172a. "The husband has the management and control of community real property . . ."

such is property and creates vested rights. The majority opinion refuses to follow the logical approach that where the policy is concededly purchased with community funds, it is community property and each spouse has a one-half interest in the policy as an owner. It also refuses to accept the logical conclusion that the husband, though he has control and management, cannot give away more than what he owns, namely his half, and it is to be noted that the California courts follow this rule not only in the case of insurance policies, but also in the case of real property (*Dargie* v. *Patterson* (1917), 176 Cal. 714, 721, 169 Pac. 360; *Lehaney* v. *Lehaney* (1929), 208 Cal. 323, 328, 281 Pac. 67; *Britton* v. *Hammell* (1935), 4 Cal. 2d 690 (52 Pac. 2d 221) and other personal property (*Ballinger* v. *Ballinger* (1937), 9 Cal. 2d 330, 334, 70 Pac. 2d 629). The court feels compelled to avoid these conclusions upon the ground of statutory construction, but such a construction is neither reasonable nor necessary.

The majority states that the act permits the insured to select his beneficiary and he can do this without reference to the law of his domicile. But these words appear in insurance policies other than National Service policies, and, as was so ably pointed out by counsel for the appellee, and in the dissenting opinion there is no need to ascribe any greater significance to them in a contract which is between the federal government and the insured and one which is between a private company and the insured, and in the latter instance the majority concedes that the community property law is applicable.

But the all-important fact is that the community property law when applied to the facts of the instant case does not deprive the insured of the right to select his beneficiary and to insure that that beneficiary receive the proceeds of the policy which the insured has the power to dispose of. The insured has a half interest in the policy, he is a half

owner of the policy and as to that half interest Congress has permitted him to name the beneficiary to the exclusion of his spouse or anyone else. The California courts have always recognized that where the husband makes a gift of community property to a third person and dies, the gift is not void, but is valid as to his half interest. (*Dargie* v. *Patterson* (1917), 176 Cal. 714, 721, 169 Pac. 360; *Lahaney* v. *Lahaney* (1929), 208 Cal. 323, 328, 281 Pac. 67; *Britton* v. *Hammell* (1935), 4 Cal. 2d 690, 52 Pac. 2d 221; *Ballinger* v. *Ballinger* (1937), 9 Cal. 2d 330, 334, 70 Pac. 2d 629; *Grimm* v. *Grimm* (1945), 26 Cal. 2d 173, 175, 157 Pac. 2d 841.) This still leaves plenty of substance to the provision of the act permitting the insured to designate his beneficiary, for in the absence of such a provision and in the absence of the provision permitting the beneficiary to be selected from a broad group, the insured might be bound to accept his spouse or children as beneficiaries even as to the half of the proceeds which he owns.

The provision of the act stating that no person shall have a vested right to the proceeds of the policy likewise is in accordance with this view, for, in the case of a service policy which is community property and in which some person other than the spouse is designated as the beneficiary, such beneficiary takes the insured's interest in the policy as a beneficiary and therefore would have no vested right to it; but in the case of the sponse in such instance, her interest in the policy does not come to her as a beneficiary, but because under the doctrine of *Lynch* v. *United States* she is the owner of a one-half interest of property in the policy and has a vested right as to this one-half interest. The dissenting opinion written by Mr. Justice Minton clearly recognizes when he states, "The nature of this dispute is a claim by the wife that she is the owner of a half portion of these proceeds because such proceeds are the fruits

of funds orginally hers." And further, when he states, "Here the wife makes no claim to rights as a beneficiary."

This fundamental concept of community property likewise shows that the provision respecting immunity of the proceeds from creditors and from attachment, levy or seizure, has no significance under the facts of the case because it has never been held that the wife in a community property state occupies the position of a creditor with respect to community assets; she has always had an ownership interest, and it is that interest which is being asserted and not the interest of a creditor. We cannot help but agree completely in view of this fundamental concept of community property law with the language of Judge Minton: "I am not persuaded that either the choice of beneficiary or the exemption provision should carry the implication of wiping out family property rights, which traditionally have been defined by state law. Fully to respect the right which Congress gave the serviceman to designate his beneficiary does not require disrespect of settled family law and the incidents of family relationship."

Import of the Decision

In considering the constitutionality of the act the majority of the Court indicated that the purpose behind the act was the enhancing of the morale of the serviceman. The majority was obviously looking at the act from the viewpoint of the facts of the case before it, i.e., the case of an insured dying in the service of his country. Even under such facts the Court must consider that it was just as fundamental a purpose for Congress to provide a voluntary and comprehensive plan of insurance coverage so that the government would have a fund from which to assist the widows and children of deceased and disabled soldiers and thus keep them off the rolls of the government charity. When

viewed from this latter point of view, it is apparent that the Court has placed too much emphasis upon the fact that the Congress allowed the insured to select and change his beneficiary, particularly when it cannot be denied that the conditions of war in all too many instances placed an unbearable strain upon the marriage ties. It is inconceivable that the Congress intended under these conditions to wipe out the safeguards of the community property system and to say to the serviceman in the words of Judge Minton: " 'You may take your wife's property and purchase a policy of insurance payable to your mother, and we will see that your defrauded wife gets none of the money.' "

But counsel for the appellee in his petition for rehearing has called attention to the problem of National Life Insurance as investment insurance and the impact which this decision has upon the status of such policies dating back to World War I. There is no better proof that Congress intended such policies to be treated as other insurance policies than the fact that the Congress, the military units of the nation, and the Veterans Administration have placed the greatest emphasis on the fact that these policies are valuable assets. At the time of enlistment, at regular intervals during the service career, upon discharge from the service, and by advertisement and dissemination of information since, the serviceman and ex-serviceman has been encouraged, persuaded and induced to maintain his National Life Insurance Policy and convert it under any of the plans offered. The Congress has repeatedly extended the provisions of law permitting such insurance to be carried, long after the wars were over, and when the morale of the serviceman was no problem, for he had become an ordinary citizen again. More recently, dividends have been paid by the Veterans Administration upon such policies upon the basis of premiums paid. There can be little doubt in the face of these facts that the Congress was just as concerned

about the welfare of the soldier as a soldier-citizen and in providing a savings plan for him and his family as it was in enhancing his morale.

Time is too short at this step in the proceedings to permit the presentation of any statistics, but it is safe to say that thousands of citizen-soldiers in community property states have continued on their government insurance, either as term insurance or under a savings plan after conversion; and until the decision in the instant case, no question could have arisen but that such policies were community assets when paid with community funds. Here again, it is inconceivable that it was within the Congressional intent that such policies, which might perhaps represent the total community savings, might be applied for non-community purposes by the insured spouse with no remedy to the other member of the community and that thus the safeguards of the community system be totally wiped out.

The Decision Creates Doubt and Uncertainty as to the Status of Funds Received From the Federal Government by Soldier-Citizens of Community Property States.

As pointed out by counsel for the appellee in his petition for rehearing, it cannot be determined from the majority opinion whether it is holding that under the facts of the case the policy is separate property and therefore the wife has no interest in the proceeds, or whether it is holding that the policy and its proceeds are community property, but that Congress has immunized the policy and its proceeds against any claims of the wife. Inasmuch as the Second World War has been over for nearly five years, the factual situation presented by the instant case is not bound to recur, but the question is bound to occur and reoccur in cases of divorce or death of the insured who has converted his policy. The question may very well occur as a result of

the policy of payment of dividends instituted by the Congress and the Veterans Administration. The soldier-citizens in community property states are entitled to know the exact status of their investments arising out of National Service Life Insurance policies so that they and their spouses may be guided accordingly.

The decision renders uncertain the situation where the premiums upon return to civilian life are paid from non-military earnings, perhaps even by the earnings of the spouse who is not insured, because the insured spouse, being the husband, has control of the checking account. It does not seem possible that the majority opinion would be extended to remove the safeguards of the community property system in such an instance, yet the danger is there unless the Court indicates its awareness of this potential situation and the relation of the facts in the instant case to it.

Finally, there is the footnote of the majority opinion which states that "The view we take of this case makes it unnecessary to decide whether California is entitled to call army pay community property." Apparently no contention was made by anyone that the funds used to pay for the premiums on the policy were not community property, and the trial court's finding that said funds were community property were without doubt based upon the general rule that all property acquired after marriage which is not acquired by gift, bequest, devise or descent, is community property. Why did the majority find it necessary to incorporate this footnote in view of the fact there was no issue in the case as to the nature of the funds? Is the Court implying that there is an open question as to whether or not army pay can be community property? Such a possibility would affect not only National Service Life Insurance policies but also all of the investments made by

returning servicemen in community property states from their service wages accumulated because of their thriftiness or because the geography of their military service precluded their spending any of their pay. The number of veterans who ventured into business with their accumulated service wages was extensive, and the total investment is large; it scarcely seems possible that the Court intended to even consider this question of such great importance by means of a footnote, and yet the footnote appears in the opinion and the inference can be drawn.

Conclusion

A very large segment of the population of these United States lives under the domain of the community property system. It is a practical system of husband and wife relationship and yet it is a salutary one. Now that the wars have ceased, the government insurance which originated with the wars is being continued for investment as well as safeguard in many instances in accordance with specific Congressional approval. By its decision the Supreme Court has seen fit to remove from these policies the safeguards of the community property system, and this despite the fact that the Congress was well aware of how many of the citizens of this country reside under such a system of property ownership. In the face of this, the Supreme Court has decided that while all other property including other insurance policies, may be held under the rules of community property, National Service Life Insurance policies may not be. It certainly seems that the states joined in this Amicus Curiae Brief, which have heretofore not appeared in this case, should be given a full and fair opportunity to present the case for their soldier-citizens, so that this Court before it has made its final decision in this case can feel that it has had the benefit of complete presenta-

tion by all interested parties on a decision of tremendous import.

Respectfully submitted,

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